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NO. 80-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIMMY R. COLE, d/b/a JIM R. COLE & ASSOCIATES and COLE DEVELOPMENT COMPANY, INC.
Petitioners,

v.

CONTINENTAL OIL COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners', Cole, et al., addressing arguments[1] first raised in Respondent, Continental Oil Company's (Conoco), Brief in Opposition, file this Reply Brief.

1. Petitioner would point out that the agreed entry of injunction pending review by this Court mentioned by Conoco was subsequent to, and caused in good part by, the denial of Petitioners' Motion to Stay Mandate on Feb. 25, 1981.

THE COURT OF APPEALS APPLIED AN ERRONEOUS PATENT VALIDITY STANDARD GREATLY EXPANDING THE PERMISSIBLE GROUNDS FOR PATENT MONOPOLY.

Petitioners seek review of an egregious error by the Fifth Circuit Court of Appeals as to the standard of patentability under 35 U.S.C. § 103. No mere reargument of factual issues is sought by petitioners. A substantial issue as to what may be appropriated as a patent monoply is represented to this Court for review. Simply put, may a court find a patent valid based on features known to the Patent Office in issuing the patent?

The appellate court decision below, *Continental Oil Co. v. Cole,* 634 F.2d 188 (5th Cir. 1981) sought to be reviewed here gives, at best, lip service to the standard of patent validity of non-obviousness under 35 U.S.C. § 103 of *Graham v. John Deere Co.,* 383 U.S. 1 (1966). Mention is made, in passing only, that a determination of patent validity under 35 U.S.C. § 103 requires an inquiry into the three factors[2] first set forth in *Graham,* supra, in determining obviousness under 35 U.S.C. § 103. *Continental Oil Co. v. Cole,* supra at 196. The Fifth Circuit opinion makes no mention of the progeny of *Graham* in this Court dealing with the standard of patentability under 35 U.S.C. § 103: *Anderson's-Black Rock, Inc. v. Pavement Salvage Co.,* 396 U.S. 57 (1969); *Sakraida v. AgPro, Inc.,* 425 U.S. 273 (1976); and *Dann v. Johnston,* 425 U.S. 219 (1976).

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2. Scope and content of prior art, Differences between claims and prior art, and Level of ordinary skill in the art.

The appellate court's decision sought to be reviewed here can be construed to read the standards of 35 U.S.C. § 103 repeatedly enunciated by this Court out of the law, since courts and one of ordinary skill in the art are precluded from considering the effect of a patent "by speculating what might be gleaned from it." *Continental Oil Co. v. Cole,* supra at 196. This, however, is exactly what courts must do in determining patent validity under *Graham,* where: "The emphasis on nonobviousness is one of inquiry . . ." *Graham,* 383 U.S. 1, 17.

THE "LINCHPIN" OF ROTATABILITY WAS KNOWN PRIOR TO CONOCO

The Fifth Circuit's alleged "linchpin" of its decision is that the Baker reference, U.S. Patent No. 3,372,666 (P.App. E) did not teach the utilization of a "rotatable seismic cable". *Continental Oil Co. v. Cole,* 634 F.2d at 197. In seizing the "linchpin", the appellate court disregarded an important point—the feature of rotatability of a depth controller connection to a seismic cable, as shown in Reid, U.S. Patent No. 2,607,842 (P.App. G), was known and cited by the Patent Office Examiner (See P.App. D-10) who issued the Conoco '800 patent.

Conoco attempts, however, to have this Court ignore Reid because it was not mentioned by either of the courts below. The trial court did not discuss the Reid rotation feature since it decided there was no infringement and did not reach the issue of the invalidity of the Conoco '800 patent. The major reason that review of the appellate court decision is sought here by Petitioners is that the rotatability feature of Reid was ignored in the Fifth Circuit.

Rotatability, indeed, was not even unique to Reid prior to Conoco, since it was known to Baker (P.App.F) prior to Conoco. Not only are the Baker documents and the Baker working device prior art under 35 USC § 102, but they are clearly available under 35 USC § 103 as additional teachings that rotatability of the seismic cable depth controller connection was well within the level of ordinary skill in the art.[3]

SUMMARY

This petition does not involve a reargument of facts. It involves an appellate court's ignoring of the strict standard of patentability under 35 USC § 103 repeatedly enunciated by this Court. If the appellate court decision is permitted to stand as precedent, courts could ignore known prior art and deprive the public of the use of that prior art teaching in holding a patent valid. In this case, the prior art is in the form of the expired Reid patent, which shows the appellate court's alleged "linchpin" of a rotatably connected seismic cable depth controller. The Fifth Circuit decision can be viewed as carefully reasoned (as Conoco urges) only by wearing blinders and using tunnel vision to ignore the teachings of the Reid patent and the work of Baker.

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3. The issues of "suppression" and alleged unpublished information are also *legal* issues of extreme importance. For example, can there be *unintentional* suppression under 35 USC 102 as the Court held below? Are not prior *unpublished* documents fully disclosing the "linchpin" pertinent for a Court to consider on the issue of "obviousness" under 35 USC § 103? See, e.g., *Beckton, Dickinson & Co. v. Sherwood Medical Industries, Inc.*, 516 F.2d 514, 521 (5th Cir. 1975).

Accordingly, for reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully submitted that a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petitioners' Reply Brief to Respondent's Brief in Opposition have been this date served on opposing counsel by placing same in the United States Mail, postage prepaid and properly addressed.

ALBERT B. KIMBALL, JR.